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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/854,179	05/11/2001	John P. Ersparer	1313/1G996US2	7219
7278	7590	10/21/2003	EXAMINER	
DARBY & DARBY P.C. P. O. BOX 5257 NEW YORK, NY 10150-5257			PATEL, NIHIL B	
			ART UNIT	PAPER NUMBER
			3743	

DATE MAILED: 10/21/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	09/854,179	ERSPAMER ET AL.	
	Examiner Nihir Patel	<b>Art Unit</b>	3743

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on July 3<sup>rd</sup>, 2003.
- 2a) This action is FINAL.      2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) \_\_\_\_\_ is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-50 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) The oath or declaration is objected to by the Examiner.

#### Priority under 35 U.S.C. §§ 119 and 120

- 13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) All b) Some \* c) None of:  
1. Certified copies of the priority documents have been received.  
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) The translation of the foreign language provisional application has been received.
- 15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                             | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____  |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)         | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ | 6) <input type="checkbox"/> Other: _____                                    |

## **DETAILED ACTION**

### ***Response to Arguments***

1. Applicant's arguments filed on July 3<sup>rd</sup>, 2003 have been fully considered but they are not persuasive. In reference to claims 1-9, 24-29, 31, 33, 34, 44, and 45 (Hoey in view of Lariviere), the applicant argues that Hoey in view of Lariviere does not render the claimed invention obvious and that it is impermissible to pick and choose from Lariviere only so much of it as will allegedly support a conclusion of nonobviousness. The examiner disagrees. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references.

See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

The applicant also argues that Hoey nor Lariviere teach or suggest 'a hydrophobic vapor-transmissive moisture barrier integral with the lower surface of the absorbent layer'. The examiner disagrees. Hoey does disclose a hydrophobic vapor-transmissive moisture barrier integral with the lower surface of the absorbent layer (see column 12 lines 10-20; and figures 1 through 4). In conclusion, claims 1-9, 24-29, 31, 33, 34, 44, and 45 are still rejected under 35 U.S.C. 103(a) (Hoey in view of Lariviere).

In reference to claims 10-12 (Hoey in view of VanGompel et al.), the applicant argues that hoey in view of VanGompel does not render the presently claimed invention, considered as a whole, obvious. The examiner disagrees. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413,

208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In conclusion, claims 10-12 are still rejected under 35 U.S.C. 103(a) (Hoey in view of VanGompel).

In reference to claims 13-15 (Hoey in view of Ferguson et al.), the applicant argues that it is impermissible to pick and choose from Ferguson to the exclusion of the other parts necessary to a full appreciation of what the reference fairly suggests to one skilled in the art. The examiner disagrees. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In conclusion, claims 13-15 are still rejected under 35 U.S.C. 103(a) (Hoey in view of Ferguson et al.).

In reference to claim 16 (Hoey in view of Lasko et al.), the applicant argues that Lasko clearly does not suggest providing air permeability in the unitary absorbent core. The examiner disagrees. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir.

1992). In this case, Hoey discloses the applicant's invention as claimed with the exception of providing an absorbent core that an air permeability of 18m<sup>3</sup>/min/m<sup>2</sup> or greater whereas Lasko's apparatus provides an absorbent core that an air permeability of 18m<sup>3</sup>/min/m<sup>2</sup> or greater. Therefore claim 16 is still rejected under 35 U.S.C. 103(a) (Hoey in view of Lasko et al.).

In reference to claims 17-20 (Hoey in view of Keuhn, Jr., et al.), the applicant argues that Keuhn teaches away from the presently claimed invention as the water transmission rate of 3000 g/m<sup>2</sup>/24hr or greater is imparted by a backsheet. The examiner disagrees. The backsheet in Keuhn's apparatus acts as an unitary absorbent core having a water transmission rate of 3000 g/m<sup>2</sup>/24hr or greater. Therefore claims 17-20 are still rejected under 35 U.S.C. 103(a) (Hoey in view of Keuhn, Jr., et al.).

In reference to claim 36 (Hoey in view of Lubnin et al.), in response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In conclusion, claim 36 is still rejected under 35 U.S.C. 103(a) (Hoey in view of VanGompel).

In reference to applicant's argument on claim 37 (Hoey in view of Chen et al.), the examiner would like to point out to the applicant that Hoey discloses a non-woven fibrous absorbent layer but does not disclose the process (air laid process) used to produce the non-woven fibrous absorbent layer, whereas Chen does. Therefore claim 37 is still rejected under 35 U.S.C. 103(a) (Hoey in view of Chen et al.).

In reference to claims 38 and 39 (Hoey in view of Yong), the applicant argues that the combination of Hoey and Yong would render Hoey unworkable for its intended purpose. The examiner disagrees. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Therefore claims 38 and 39 are still rejected under 35 U.S.C. 103(a) (Hoey in view of Yong)

In reference to claims 21-23, 46, and 47 (Hoey in view of Roslansky et al.), the applicant argues that there is no disclosure in Roslansky of a barrier effectiveness value of 75mm or greater. The examiner disagrees. Roslansky does disclose a barrier effectiveness value of 75mm or better (see column 12 lines 1-10). In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Therefore claims 21-23, 46, and 47 are still rejected under 35 U.S.C. 103(a). (Hoey in view of Roslansky et al.)

In reference to claims 40 (Lubnin in view of Paul et al), in response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Therefore claim 40 is still rejected under 35 U.S.C. 103(a) (Lubnin in view of Paul et al.).

In reference to claim 48 (Hoey in view of Roe et al.), in response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Therefore claim 48 is still rejected under 35 U.S.C. 103(a) (Hoey in view of Roe et al.).

In reference to claim 49 (Hoey in view of Graff et al.), in response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Therefore claim 49 is still rejected under 35 U.S.C. 103(a) (Hoet in view of Graff et al.).

In reference to claim 50 (Hoey in view of Shirayanagi et al.), in response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231

USPQ 375 (Fed. Cir. 1986). Therefore claim 50 is still rejected under 35 U.S.C. 103(a) (Hoey in view of Shirayanagi et al.).

In reference to claim 41 (Hoey in view of Graff et al.), in response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Therefore claim 41 is still rejected under 35 U.S.C. 103(a) (Hoey in view of Graff et al.).

In reference to claim 42 (Hoey in view of Woon), in response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Therefore claim 42 is still rejected under 35 U.S.C. 103(a) (Hoey in view of Woon).

***Conclusion***

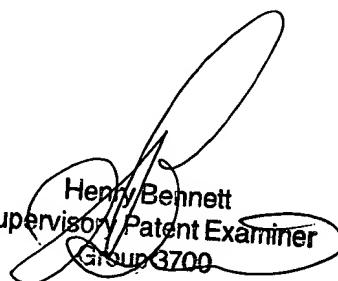
2. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37

CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communication from the examiner should be directed to Nihir Patel whose telephone number is (703) 306-3463. The examiner can normally be reached on Monday-Friday from 7:30am to 4:30pm. If attempts to reach the examiner by telephone are unsuccessful the examiner's supervisor Henry Bennett can be reached at (703) 308-0101.

NP  
October 3, 2003



Henry Bennett  
Supervisory Patent Examiner  
Group 3700